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## Many presumptions and no guarantees

Preliminary observations on *Shepherd C-472/13*

VALENTIN JEUTNER — 27 February, 2015



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Yesterday, several (German) newspapers reported that the ECJ empowered the Bavarian Administrative Court in *Shepherd v. Germany C-472/13* to examine whether or not the United States committed war crimes in the course of the US-led invasion of Iraq. This certainly makes for a catchy headline, but a preliminary study of the decision reveals that it is unlikely that the Bavarian Court will need to get its hands dirty by engaging with this highly sensitive question. Indeed, after *Shepherd* the legal presumption against the US' commission of war crimes is seemingly so irrebuttable that the Bavarian Court can rest assured that the claimant, Mr Shepherd, will probably fail to come even close to require

the Court to consider the intricacies of the complex controversy surrounding the US invasion of Iraq.

### **The facts**

The Bavarian Administrative Court had made a preliminary reference to the ECJ in relation to the case of Mr Shepherd, a US Citizen, who enlisted in the US Army in December 2003 as a helicopter maintenance mechanic stationed in the Bavarian Katterbach. After an initial deployment to Iraq in late 2004, Mr Shepherd's unit returned to Germany in February 2005. When Mr Shepherd later received orders to return to Iraq he decided to leave the US Army on 11 April 2007. Subsequently, he applied for asylum in Germany arguing that he "must no longer play any part in [the illegal] war in Iraq...and in the war crimes that were...committed there." (para 17) He also argued that as a result of his desertion he could face criminal prosecution and social ostracism in the United States where desertion was considered to be a "serious offence". (para 17) Nonetheless, Germany's Federal Office for Migration and Refugees rejected Mr Shepherd's application in 2011 and Mr Shepherd appealed to the Bavarian Administrative Court to overturn that decision. Due to certain ambiguous provisions of a controlling EU Directive, the Administrative Court referred a number of questions for a preliminary ruling to the European Court of Justice.

### **The question**

The key point of contention concerned articles 9(2)(b), (c), (e) of Qualification Directive 2004/83/EC (implemented by the German Asylverfahrensgesetz and the Aufenthaltsgesetz) which provide in relevant part that "acts of persecution"

upon which an application for refugee status could rely, include:

b) legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner;

c) prosecution or punishment, which is disproportionate or discriminatory;

e) prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include [the commission of : war crimes, (art. 12(2)a, Directive) as defined *inter alia* by the art. 8(2)a Rome Statute];

### The reply

In response to the Administrative Court's questions concerning article 9(2)(e) the ECJ clarified that art. 9(2)(e) could be invoked by all military personnel irrespective of rank or task (para 33) who are or will be (para 39) involved with the direct or indirect commission (para 37) of war crimes within an "actual conflict" (para 35). So as long as Mr Shepherd could establish that there was a high likelihood of committing war crimes in Iraq (assuming the Iraq war constitutes an "actual conflict"), the mere fact that such acts lay in the future at the time of his decision to leave the army and his mere indirect involvement with such crimes as a helicopter technician would not prevent him from invoking article 9.

However, in order to establish a high likelihood of the commission of war crimes, Mr Shepherd would have to satisfy an extremely high burden of proof. According to the ECJ, when assessing Mr Shepherd's submissions, significant

attention should be paid to the fact that the US' actions were backed by a mandate of the UN Security Council, which provides "any guarantee that no war crimes will be committed..." (para 41), and by "a consensus on the part of the international community". Additionally, the existence of domestic US legislation outlawing war crimes renders Mr Shepherd's claim "implausible" (para 42). Finally, Mr Shepherd would need to establish that his refusal to perform military services "constituted the only means by which... participating in the alleged war crimes" could be avoided (para 44).

Alternatively, Mr Shepherd could seek to argue that the penalty he would face in the United States is disproportionate or discriminatory pursuant to arts. 9(2)(b) and (c). However, again the Court places the burden of proof on Mr Shepherd and appears to observe that there is a presumption in favour of the measures being both proportionate and non-discriminatory. The Court rejects outright that "the social ostracism and other disadvantages" Mr Shepherd might face could provide a ground for asylum.

### **Brief, preliminary observations**

In some respects the Court's judgment strengthened the position of deserters who rely on article 9 of the Directive as most of the German authority's arguments were rejected. Contrary to what the German Federal Office for Migration and Refugees had argued it is now clear that article 9 can be invoked by military personnel of any rank even with respect to prospective acts and even when their actions would not fall within the provisions of article 25, Rome Statute of the International Criminal Court.

At the same time, however, the Court imposed a seemingly insurmountable burden of proof on Mr Shepherd. First, while the Advocate General (para 70) had stated that a UN mandate would not preclude claims for refugee status, the Court reversed that assumption observing that the existence of a UN mandate entails “every guarantee that no war crimes will be committed.” There are at least two issues with regard to this argument: first, given the controversy surrounding the legality of the US-led Iraq invasion and given that one might legitimately question the Court’s observation that there was “a consensus...of the international community” regarding the war’s lawfulness, one could argue that the Court raised the threshold which Mr Shepherd needs to overcome in this regard higher than it had to. Second, and more fundamentally, it is not clear why the alleged legality of going to war should entail any “guarantee” that in the course of a subsequent armed conflict no war crimes would be committed. Indeed, if it was accepted that there is a causal link between the legality of going to war and a decreased likelihood of the occurrence of war crimes, then this would mean that US forces were more likely to commit war crimes if the invasion itself was deemed illegal. Now this is a strange result – because even if one believes that the Iraq invasion was unlawful this does not automatically imply that there should be a higher presumption in favour of the argument that war crimes were/will be committed. Against that background the Court’s reference to the existence of a UN mandate and to a mysterious “consensus...of the international community” seems misplaced.

Second, the Court stated that the existence of domestic legislation outlawing war crimes would render any contrary claim “implausible”. Again it is not clear why domestic legislation outlawing war crimes should establish any

presumption in favour of that state's conformity with humanitarian law. Indeed, the argument seems to suggest that there should also be a presumption that states, who outlaw torture for example (almost all states, including the US), did/do not torture (which many states did/do nonetheless, including the US). The Court appears to have an incredibly (but perhaps unsurprisingly?) legalistic understanding of reality and appears to find it hard to believe that there could ever be a discrepancy between a state's conduct and a state's declarations.

Only the Court's final argument, that Mr Shepherd needs to show that leaving the army the way he did was his only way to avoid any involvement with alleged war crimes, seems sensible. It is likely that the Bavarian Court will focus on this point as it bypasses all the sensitive issues raised by the previous questions. In any case, it seems improbable that Mr Shepherd will be able to overcome the hurdles the European Court placed in his path and attempting to assemble the required "body of evidence" capable of displacing the tremendous authority attributed to the UN mandate and the alleged "international consensus" will take an enormous amount of time and effort. Against that background it might be a win-win situation for both Mr Shepherd and the Bavarian Court if Mr Shepherd prioritised his claim based on his status as a conscientious objector under art. 10(1)d of the Qualification Directive, which faces slightly lower legal thresholds than art. 9(2)e, and which avoids the need for the Bavarian Court to pronounce on the legality of US conduct in Iraq.

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